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THE
AMERICAN LAW REGISTER.

MARCH, 1862.

COMPETENCY OF WITNESSES.

Jeremy Bentham was certainly a very remarkable man. With all his radicalism, there was so much common sense in his conclusions upon legal reform, that in spite of very strong prejudices they have been gradually making their way both in England and the United States, and in England faster than in the United States. For more than twenty years the professional mind in England may be considered as settled upon the opinion that all arbitrary rules of exclusion of testimony are unjust and inexpedient; and this opinion is not merely founded upon speculation, but created and confirmed by actual experience in the administration of the Law. Practically now in the English courts all persons are competent witnesses, their credibility being left to the jury. In a letter from Sir John Barnard Byles, author of the *Treatise on Bills of Exchange*—and now one of the justices of the Court of Common Pleas—to the writer of this article, March 3, 1860, he says: “You do me the honor to desire my opinion on the practical effect of the English statutes, tending to the abolition of the incompetency of witnesses. As to the removing all disqualification from wit-

nesses *not parties to the cause*, no difference of opinion exists. The change has proved a salutary reform with no attendant evils. As to admitting the parties themselves, and their wives, it has been found (as might have been expected) that on the one hand, the discovery of the truth is greatly facilitated, but that on the other hand, perjury is greatly increased. Yet I think the general opinion is, that the advantages of the change much outweigh the evils. Certainly my experience at the bar and on the bench has led me to that conclusion decidedly, yet I would not extend the capacitation to defendants in criminal cases, nor to inquiries into adultery between man and wife."

England, however, did not jump at once to the conclusion finally reached, but proceeded slowly and cautiously step by step, trying the effect of one change before proceeding to adopt another more extreme and radical. First came the statutes 3 and 4 William IV. c. 42; which enacted, that "in order to render the rejection of witnesses on the ground of interest less frequent, if any witness should be objected to as incompetent, on the ground that the verdict or judgment in the action would be admissible in evidence for or against him, he should nevertheless be examined; but in that case the verdict or judgment should not be admissible for or against him, or any one claiming under him." A much greater change was, however, made by the statute 6 and 7 Vict., c. 85; which removed incompetency by reason of incapacity from crime or on the ground of interest in all persons except the parties to the suit, or the persons whose rights were involved therein, such as the real plaintiff in the fictitious action of ejectment, or any person in whose immediate and individual behalf any action was brought or defended, or the husband or wife of such persons. These provisions having been found to operate beneficially, the statute 14 and 15 Vict., c. 99, was passed, by the first section of which the proviso in the statute 6 and 7 Vict., c. 85, (which excluded all persons directly interested in the suit) was repealed. By the second section, the parties and persons in whose behalf any action, suit, or other proceeding is brought or defended, are made (except as therein excepted) competent and compellable to give evidence on behalf of either or

any of the parties to the suit in any court of justice. The third section of the statute provides that it shall not render any person charged with an offence, competent or compellable to give evidence against himself, nor shall it in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. The fourth section of the statute further provides, that it shall not apply to any proceeding instituted in consequence of adultery, or to any action for breach of promise of marriage. It was decided soon after it had become law, that the second section of the statute did not render a wife admissible as a witness for or against the husband; and in consequence, the statute 16 and 17 Vict., c. 83, was passed, enacting that the husband and wife of the parties to any suit, or of the person on whose behalf any such proceeding is brought or defended, shall thereafter be competent and compellable to give evidence on behalf of either party or any of the parties. Neither husband nor wife is compellable, however, to disclose any communication made or received during marriage; and neither party is a competent witness in a criminal proceeding, or in any proceeding instituted in consequence of adultery.

Such is a brief synopsis of British legislation upon the subject; and now the important question is, whether some or all of these changes ought not to be introduced into the jurisprudence of the United States. In the State of New York they have been all introduced—parties are competent for themselves, and compellable to testify for the adverse interest. So far the change seems to have worked well in that State.

It would seem the dictate of prudence, that such alterations should be proceeded in gradually and cautiously, as they have been in England. The public should be accustomed to such important changes by degrees. The danger is, that the sudden throwing open the doors of evidence might at once admit too great a crowd, and the profession and community might become disgusted with some of the immediate consequences, and the system be repealed as suddenly as it was enacted, without having had a fair trial.

There are dangers and inconveniences attending it, as well as advantages, and it is only by carefully weighing them all, which can only be the work of time and experience, that a sound estimate of the balance on one side or the other can be arrived at. What should be done at first, and all that should be done, should be to abolish the objection to incompetency, arising from interest or infamy, and if after some years of trial, that change should be found to be a real reform, it will be time enough then to open the door still wider. It may be that a system which is found suitable for England would be found not suitable for this country, and then it would be comparatively easy to retrace our steps. There is the more force in this, as the disclosure of facts in the knowledge of parties may be obtained by means of a bill of discovery, in aid of legal proceedings. Thus practically, a party is *compellable* though not *competent* to testify.

The civil law abounded in restrictions upon the admission of witnesses, but it had one merit not possessed by the common law—that of consistency. Its leading principle was *exclusion*, wherever any possible motive existed, which could operate to produce falsehood. It extended its prohibition to relations (parents and children, by the Roman law—in the French law, collaterals, even to the fourth degree;) to servants and domestics; freedmen and clients; advocates, attorneys, tutors, curators, persons who had been concerned in criminal prosecutions with either party, and finally even those who by eating and drinking with the party by whom they were produced, had thrown themselves open to the suspicion of perjury. But the civil law is a system to which trial by jury is a stranger, and great power and discretion are given to the judge, both in admitting and excluding testimony, and in deciding upon the weight which is due to it.

In England, those barbarous modes of judging of controversies which belonged to the feudal system, the appeal to the special interposition of Providence, the ordeal, the corsned or morsel of execration, and the wager of battle continued long, but were finally superseded by the trial by jury. The wager of law, which lasted the longest, with its jury of compurgators, may have been the

cradle in which this last mode of trial was originally nursed. "He that has waged or given security to make his law, brings with him into court eleven of his neighbors—a custom which we find particularly described so early as in the league between Alfred and Guthrun, the Dane—for by the old Saxon constitution every man's credit in courts of law depended upon the opinion which his neighbors had of his veracity. The defendant, then standing at the end of the bar, is admonished by the judges of the nature and danger of a false oath. And if he still persists, he is to repeat this or the like oath: 'Hear this, ye justices, that I do not owe unto Richard Jones the sum of ten pounds, nor any penny thereof, in manner and form as the said Richard hath declared against me. So help me God.' And, thereupon, his eleven neighbors or compurgators shall avow, upon their oaths, that they believe in their conscience that he saith truth; so that himself must be sworn *de fidelitate*, and the eleven *de credulitate*. It is held, indeed, by later authorities, that fewer than eleven compurgators will do; but Sir Edward Coke is positive that there must be this number, and his opinion not only seems founded upon better authority, but also upon better reason; for as wager of law is equivalent to a verdict in the defendant's favor, it ought to be established by the same or equal testimony, namely, by the oath of *twelve* men. And so, indeed, Glanvil expresses it, *jurabit duodecima manu*: and in 9 Henry III., when a defendant in an action of debt waged his law, it was adjudged by the court *quod defendat se duodecima manu*. Thus, too, in an author of the age of Edward the First, we read *adjudicabitur reus ad legem suam duodecima manu*. And the ancient treatise, entitled *Diversité des Courts*, expressly confirms Sir Edward Coke's opinion." 3 Blackst. Com. 343.

In the first rude state of the trial by jury there are strong grounds for believing that the twelve men drawn from the immediate vicinage of the parties, or rather of the fact to be determined, decided in most instances from their own personal knowledge. Hence arose, as we know, the necessity that a place as well as time should be avowed in pleading every fact. We know, too, that upon one issue, that arising upon the plea of *non est factum*, the wit-

nesses named in the deed, as they usually then were, instead of its being subscribed by them, were required to be summoned as jurors, joined in the inquest, and united in the verdict. "But seeing the witnesses named in a deed shall be joined to the inquest, and shall in some sort join in the verdict, (in which case, if jury and witnesses find the deed that is denied to be the deed of the party, the adverse party is debarred of his attain, because there is more than twelve that affirm the verdict,) it is reason that in that case of joining, such exception shall be taken against the witness as against one of the jury, because he is in the nature of a juror:" 1 Inst. 66. "Trial by jury," says Sir Francis Palgrave, "according to the old English law, was a proceeding essentially different from the modern tribunal still bearing the ancient name, by which it has been replaced, and whatever merits belonged to the original mode of judicial investigation—and they were great and unquestionable, though accompanied by many imperfections—such benefits are not to be exactly identified with the advantages now resulting from the great bulwark of English liberty. Jurymen of the present day are triers of the issue: they are individuals, who found their opinion upon the evidence, whether oral or written, adduced before them; and the verdict delivered by them is their declaration of the judgment which they have formed. But the ancient jurymen were not empannelled to examine into the credibility of the evidence; the question was not discussed and argued before them; they, the jurymen, were the witnesses themselves; and the verdict was substantially the examination of those witnesses, who, of their own knowledge, and without the aid of other testimony, afforded their evidence respecting the facts in question, to the best of their belief. In its primitive form, a trial by jury was, therefore, only a trial by witnesses, and jurymen were distinguished from any other witnesses only by the custom, which imposed upon them the obligation of an oath, and regulated their number, and which prescribed their rank and defined its territorial qualification from whence they obtained their degree and influence in society." Palgr. 243. "If any of those knights, who appeared upon the grand assize, happened to be unacquainted with the truth of the

matter they were rejected and others chosen, until twelve were unanimous. If the jurors professed to know the truth, but dissented from one another in their statements of the fact, the array was 'afforced,' that is to say, other witnesses were sought for, cognisant of the disputed allegation, until twelve at least could be found, who would give testimony, for that number was deemed almost indispensable." Ib. 247. "Trial by jury was an appeal to the knowledge of the country; and the sheriff, in naming his panel, performed his duty by summoning those individuals from amongst the inhabitants of the country who were best acquainted with the points at issue. If, from peculiar circumstances, the witnesses of a fact were previously marked out and known, then they were particularly requested to testify. Thus, when a charter was pleaded, the witnesses named in the attesting clause of the instrument, and who had been present in the folk mote, the shire or manor Court, when the seal was affixed by the donor, were included in the panel; and when a grant had been made by parol the witnesses were sought out by the sheriff and returned upon the jury." Ib. 248.

When the system, thus sketched, came subsequently in the progressive advancement of population and wealth to be of necessity changed, reasons existed of sufficient force to lead to the adoption of exclusionary rules.

It was, in effect, but applying, with some modification, the rules in regard to the competency of jurors, who were, as we have seen, both witnesses and triers, and, therefore, required to be *omni exceptione majores*, to witnesses examined before them. It is certain, however, that from the earliest periods, of which authentic records have reached us, the judges, in whose presence the trial took place, have exercised the power of determining what witnesses shall be heard or excluded, and what evidence shall be submitted to the jury. The jury was usually composed of rude and illiterate men. It was supposed to be advisable to keep from them altogether, not only all which was not clearly relevant to the issue, but every thing coming from sources open to suspicion. Thus grew up a technical and artificial system: and as jurors became more capable of exercising their functions intelligently, the courts

have struggled constantly, so far as they could consistently with the settled principles of such a system, to open the door as wide as possible to the admission of all evidence, calculated to assist in attaining equal justice in the controversy. Hence, so many rules and so many exceptions to every rule: so many chapters where the exceptions cover much broader ground than the rule itself.

Let us consider briefly the practical operation of the simple change proposed of abolishing all objections to the competency of witnesses on the score of infamy and interest.

I. Of infamy. It may be stated briefly, as the result of the cases, that judgment against any person for treason, felony, or the *crimen falsi*, renders him incompetent to testify. The *crimen falsi* includes forgery, perjury, subornation of perjury, and other crimes affecting the administration of justice. It is not competent for a party, when a person is offered as a witness, to give evidence to prove him to have been guilty of such a crime. Even the verdict of a jury, if not followed by judgment, is inadmissible. Nor will even a judgment of the court of a foreign state render him incompetent, though it is admissible, to affect his credit. If a domestic judgment be reversed, though for mere irregularity, it restores his competency, and a pardon completely rehabilitates him, except when the statute, as a part of the punishment, expressly imposes the incapacity.

Surely, the mere statement thus given condemns the rule of exclusion as arbitrary and unreasonable in the highest degree. The worst criminals, if they have no motive to commit perjury, will prefer to tell the truth, and the fact of legal infamy, though very strong evidence, if such motive be shown to exist, that they are wanting in moral principle to resist it, proves nothing, standing alone, even as to the probability of perjury. The judgment should in all cases be admissible to affect credibility—and the very distinction established between a foreign and domestic judgment is a confession of the unreasonableness of the rule of exclusion. It is a distinction without a difference, so far as any reason bearing upon the probability of perjury is concerned. In like manner the reversal of the judgment for error, not being the award of a new

trial on the merits, surely ought not, upon any sound reason, to restore the capacity of the witness. The moral taint is not wiped out by such a reversal. Nor has a pardon any such effect. If, therefore, a heinous crime should be committed, a gross fraud or personal injury perpetrated, or important money transaction take place, and no one present but a legally infamous person, however much his testimony and all the circumstances corroborating its truth, would leave no doubt upon the mind, yet, as he is incompetent to testify, the ends of public and private justice are all prostrated, because he might commit perjury. So may any witness, convicted or unconvicted, and the business of the tribunals is to sift evidence, to weigh its credibility, and to decide upon all the light which can be thrown upon the subject. Had the incapacity been confined to the single case of a conviction of perjury, something plausible might be urged in its favor. But why should treason exclude, and riot not; murder exclude, and assault and battery not; robbery exclude, and embezzlement or cheating not. The list of offences might be gone over, and when you came to settle what crimes do and what do not indicate that want of moral principle which would probably produce perjury, no line of demarcation can possibly be drawn.

II. Interest. The rule is that a present interest in the event of a suit excludes the witness. But it must be a *certain* interest, and then no matter how small it is. If *contingent*, and no matter how slightly contingent, then, without reference to its character or amount, it is an objection to credibility only and not to competency. The only son and heir apparent of a party, who is claiming or defending a valuable estate, is heard without objection. A gentleman of known probity, of high and honorable character, of liberal education, of wealth and station, whose word in the society in which he moves would be taken as readily as his bond, is excluded because he has some trifling pecuniary interest which he is unwilling, and which it would be unreasonable to expect him to release, while a poor wretched dependent of one of the parties, a servant or retainer, who has no other resource but his bounty or favor for his daily bread, is heard without scruple.

A debtor in failing circumstances makes a bill of sale of his goods to a friend. They are levied upon by one of his creditors and the bona fides of the bill of sale is tried between the vendor and the creditor. The legal interest of the debtor is, that the creditor should recover; he is, accordingly, an incompetent witness for him, but competent for the vendee in the bill of sale. Every day's experience proves, that if the rule of exclusion is to be based upon the probabilities of falsehood, the case should be reversed.

It is too low an estimate of human nature to presume that the force of pecuniary interest will generally or even probably lead to the commission of wilful perjury. The character of a man is of more value in the society where he lives, than the amount in controversy in any ordinary case. Men not only know this, but they feel it. The hazard of detection is great, and would be increased by the abolition of the exclusionary rule. In fact, a new and valuable security would thus be gained for the truth of evidence. Pride of character is a more powerful principle of action than love of money, and when it comes to the use of such means as falsehood and perjury, it will instinctively shrink back and betray itself in all but the most abandoned wretches, whose characters, in general, may easily be proved *aliunde*. On the other hand, for one case gained by perjury ninety-nine have been lost on account of the parties being precluded, by artificial rules, from submitting all the facts to the tribunal to which is committed the decision of their cause.

No stronger exposition of the inconvenience of the rule of exclusion could be made than that which would be afforded by a digest of all the cases, *pro* and *con*, which have been decided in this country and England, upon the subject of the incompetency of witnesses arising from interest. How often are collateral issues thus introduced into a cause, and frequently, after years of litigation, the decision reversed in the appellate court, and sent back, because a mistake was committed in the admission or rejection of a witness on an objection of this sort—and how often are other witnesses introduced to prove a witness incompetent, when, if the same rule

was applied to them, which it is not, issue would branch out upon issue, and the decision become complicated beyond measure.

Mr. Bentham here, as in his other opinions, while he has treated the general subject with great, though eccentric ability, in his elaborate work in five volumes on Judicial Evidence, has gone to extremes. He is for the admission of everything, however remote, whether in the witness's own personal knowledge or the mere hearsay of others, even cotemporaneous declarations, letters, and papers of either party tending to throw light upon the subject in dispute. There certainly ought to be some barriers interposed against the manufacture of evidence; at least care should be taken not to hold out encouragement to such practices. Such would inevitably be the consequence of interfering with those most salutary rules, which forbid the introduction of mere hearsay, what may have been said by persons not produced in the face of the court and subjected to cross-examination, and to declarations of the party himself, which may be cunningly framed with an eye to a future lawsuit. As to the question of admitting parties to the suit as competent witnesses, it had better be deferred until the experiment of admitting those affected with infamy or interest is first tried. The rule adopted in New York, which allows a party to call his adversary to the stand, and extract from him, if he can, material facts, and yet leaves him at liberty still to contradict him, seems to be rather a dangerous weapon in the hands of an unscrupulous man. It would be preferable that the pleadings between the parties, confirmed by their respective oaths or affirmations, ascertaining thus what matters of fact were admitted or denied, should be submitted, or, at all events, that the old and tried method by a bill of discovery should be retained as sufficient to answer every valuable purpose.

G. S.